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IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-208.

SITKIN SMELTING & REFINING CO., INC.,
MONONGAHELA IRON & METAL CO., INC.,
Petitioners,

v.

FMC CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED.

1. Should not this Court deny certiorari in a case where the Court of Appeals' decision was not in conflict with any prior decision of this Court or of any lower court and petitioners' novel theory—"sham bidding" as a per se violation of Section 1 of The Sherman Act—was not tried or raised in the district court and no anti-competitive purpose or effects have been demonstrated?

2. Should not this Court deny certiorari in a case where the Court of Appeals, applying the proper standard of review, concluded that there was insufficient evidence for the jury to reasonably infer that the 1972 oral assurances applied to the 1973 bidding procedure, a necessary element in petitioners' contract claim?

COUNTERSTATEMENT OF THE CASE.

During the summer of 1972, Hurricane Agnes flooded FMC's rayon manufacturing facility. The damage was so extensive, FMC decided to close the plant.

On September 8, *1972* Louis Sitkin wrote to FMC expressing interest in bidding on the purchase of FMC's entire rayon plant facility, particularly the real estate. The letter stated:

> Our phone conversation of this afternoon subject real estate, we wish to advise you of our interests. . . . We are interested in building, possibly equipment, machinery, etc., as well as real estate.

After Sitkin's inquiry in the fall of 1972, Kline gave the assurances that are the subject matter of this action. He told Sitkin that if his bid were highest and best and if FMC sold the plant, it would sell it to him.

In response to those assurances, Sitkin submitted a bid that expired by its own terms on October 20, 1972. Neither Sitkin nor Kline, the only two persons who were present when the assurances were given, testified that he understood or intended the assurances to apply to anything other than the 1972 bidding for the land and the plant and its contents.

FMC withdrew its offer to sell the entire facility and did not accept either of the two bids it received. Sitkin testified that he felt FMC had dealt with him honorably: FMC had not violated Kline's assurances.

It was not until 1973 that the bidding about which petitioners are complaining occurred.

At that time, FMC donated the rayon plant and real estate to Mifflin County Industrial Authority and decided to take bids on the contents of the plant.

A three-person FMC team with the help of an outside consultant composed an invitation to bid which consisted of a two-page letter with a 122-page detailed book of specifications attached and incorporated into it, specifically outlining the bidding procedure to be followed. The invitation to bid letter specifically reserved to FMC the right to reject any and all bids. Petitioners agree that they have no cause of action respecting this 1973 invitation to bid: ". . . the highest and best bidder has no contractual right to recover at all, because a bid submitted in response to a bid solicitation does not create a contract." (Petition, p. 10).

On September 12, *1973*, the invitation to bid was sent to 50 bidders, including Sitkin Smelting & Refining Co., Inc. ("Sitkin") and Monongahela Iron & Metal Company, Inc. ("Monongahela"), the other petitioner in this action.

Petitioners' claim is that FMC's behavior in failing to accept its joint bid for the contents of the plant violates the 1972 assurances Kline gave to Sitkin and constitutes a violation of Section 1 of The Sherman Act.

The Court of Appeals set aside the jury's finding that the "1972 high bid assurance was intended to apply to the 1973 bidding," [1] because there was no evidence from which one could draw a reasonable inference that the 1972 high bid assurance was intended to apply to the 1973 bid procedure. The Court of Appeals also affirmed the District Court's findings that FMC's conduct did not constitute a violation of the Sherman Act. The appellate court found plaintiffs neither proved nor even attempted to prove an anticompetitive purpose or effect in this case. Nor did

1. The Court of Appeals did not find the 1973 bidding to be a "second round" of bidding as Petitioners state in their Statement of the Case (Petition, p. 4). In fact, their decision and the evidence in the record is to the contrary.

the Court of Appeals find any precedent or basis for creating the new per se violation of The Sherman Act that plaintiffs proposed. Plaintiffs' petition for rehearing in banc was submitted to the nine active judges on the Court of Appeals. Only one (the dissenting judge in the original decision) voted for rehearing.

REASONS FOR DENYING THE WRIT.

The petition does not merit review by this Court because the Court of Appeals' decision does not conflict with this Court's prior decisions, and none of petitioners' contentions are of great importance.

I. The Sherman Act Claim.

After a careful review of petitioners' contentions in light of the evidence and the jury's findings, the Court of Appeals concluded that neither the purpose nor the effect of respondent's conduct was anticompetitive. On the issue of purpose, the Court found "no evidence of an intent to affect quantity or quality of any goods or services" (A13).[2] On effect, the Court likewise found "no evidence . . . presented by plaintiffs which suggests that prices, quantity or quality in the scrap metal market were influenced by the combination. Nothing in the record indicates any material diminution in the existing competition for scrap" (A13).

Petitioners do not challenge the appellate court's finding that they neither proved, nor attempted to prove, any anticompetitive purpose or effect in this case. Instead petitioners maintain that they were relieved of this burden because respondent's conduct was "illegal on its face." (Petition, 5-6.)

The Court of Appeals addressed this same argument and found it "difficult to isolate any specific factors relied on by [petitioners] which would allow us to support their contention" (A11). The Court began by summarily rejecting the only per se theories which petitioners had argued in the District Court (price fixing and group boy-

2. Unless otherwise stated, references are to the Petition Appendix, in which the page numbers are preceded by the capital letter "A".

cott) (A11-12), a ruling which petitioners do not challenge here. The Court then turned to the per se theory ("sham bidding") which petitioners had not raised in the District Court, but are now pressing in this Court. Here again the Court of Appeals concluded that the conduct under attack was not "so anticompetitive that the court routinely should allow a party to invoke the per se rule and thereby avoid the need to show its affect [sic] on commerce in each case" (A12-13).

Petitioners' challenge to this holding consists, as it did in the Court of Appeals, of "conclusory statements regarding the harmful effects of the questioned combination . . . with no analysis with which to conclude that [respondent] has been a party to an unreasonable restraint" (A15). Thus, petitioners airily suggest that an alleged agreement to award a contract to one particular bidder if he matches the highest bid received from other bidders has three effects which are so pernicious as to warrant the creation of a new per se offense. According to petitioners these effects are: the other bidders do not realize that they should use "other means" besides bidding to obtain the contract; the contract price and identity of the purchase would be different absent such an agreement; and "potential competition" for the contract by unsuccessful bidders is allegedly "destroyed." (Petition, 6-7.)

Petitioners' semantic exercise is without merit. As this Court pointed out in *National Society of Professional Engineers v. United States,* No. 76-1767, 46 U. S. L. W. 4356, 4360 (April 25, 1978), "[t]he Sherman Act does not require competitive bidding. . . ." Thus, respondent could have awarded the contract to Krentzman without soliciting any other bids or even notifying anyone of its intention to sell the facility. Yet this admittedly lawful course of action would have produced every one of the

"anticompetitive" effects cited by petitioners to an even greater degree than the conduct alleged in this case. Had respondent decided to sell the Lewistown facility to Krentzman without prior notice to anyone else, respondent would have violated no law even though the other scrap dealers would have had no opportunity to submit any offers or use any "other means" to obtain the contract. The result should be no different in this case where other dealers have in fact been given notice and an opportunity to bid. Second, had respondent decided to sell the Lewistown facility to Krentzman without soliciting any other bids, it would have been immaterial whether the contract price approximated some ideal market price or not. The result should be no different in this case where respondent used a bidding procedure the purpose of which was, as characterized by the Court of Appeals, "seemingly . . . to find the market price" (A13). Finally, had respondent decided to notify no one else of the sale and negotiate only with Krentzman, respondent would have violated no law even though the "potential competition" of others would have had no effect at all on the negotiations. The result should be no different in this case where the bidding procedure turned the "potential competition" of others into actual competition that, according to the Court of Appeals, assisted the parties "to find the market price" (A13).

In short, the "harmful" effects relied on by petitioners are trivial. Indeed, they are an inevitable feature of many ordinary commercial contracts and are certainly not so "manifestly anticompetitive" as to warrant creation of a new per se offense. See *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U. S. 36, 49-50 (1977).

Petitioners assert that the Court of Appeals' decision conflicts with this Court's decision in *National Society of Professional Engineers v. United States, supra.* The only

similarity between the two cases is that both happened to involve bidding. *National Society of Professional Engineers* involved a horizontal agreement among 69,000 Society members not to engage in the "unethical" practice of competitive bidding. While perhaps "not price fixing as such," the agreement had an admitted purpose to "maintain the price level," *id.* 4359, and contained many elements of a group boycott. See *Fashion Originator's Guild of America, Inc. v. FTC*, 312 U. S. 457 (1941). It thus bore the hallmarks of a classic per se offense. The case at bar is wholly different. The agreement alleged, but not conceded in this case was a vertical agreement[3] between a single buyer and a single seller (A12) which, even accepting petitioners' characterization, involved the kind of de minimis restraint (A14) that attends many ordinary commercial contracts. See pp. 6-7, *supra*. *Professional Engineers* simply has nothing to do with this case.

Petitioners argue alternatively that the burden was on respondent to prove a "lawful purpose" in this case. This assertion is unsupportable. The burden is on the plaintiff to prove an unreasonable restraint of trade, not on the defendant to prove the absence of one.[4] The Court of

3. Petitioners assert that the distinction between horizontal and vertical agreements is immaterial. (Petition 7-8.) This Court has rejected that view. See *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977); *White Motor Co. v. United States*, 372 U. S. 253 (1963).

4. See *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 374 n. 5 (1967), *overruled in part on other grounds, Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977). Petitioners rely exclusively on certain language buried in the Court of Appeals' decision in *Addyston Pipe & Steel Co. v. United States*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U. S. 211 (1899) in support of their contention that defendants have the burden of proving a lawful restraint. The passage they cite, however, was merely a background discussion of the wholly unrelated common law doctrine of ancillary restraints, which this Court's opinion subsequently ignored. *Addyston Pipe* provides no authority for petitioners' contention.

Appeals held that regardless of FMC's purpose,[5] plaintiffs had failed to carry that burden of proof (A13-15), and that decision is not inconsistent with any decision of this Court.

Petitioners also assert that the issues raised in this Petition are of "great importance," (Petition 10). In fact, they are not. Petitioners concede that they had a remedy under state law to recover the actual losses they had suffered (A5, n. 1; Petition 10). But they renounced that remedy and now appeal to this Court to grant them a huge windfall on some general deterrence theory. But, as the Court of Appeals pointed out, quoting a very similar case in which this Court denied certiorari, "the Sherman Act is neither a lowest-responsible-bidder statute nor a panacea for all business affronts which seem to fit nowhere else" (A15), quoting *Scranton Construction v. Litton Industries Leasing Corp.*, 494 F. 2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U. S. 1105 (1975).

II. The Contract Claim.

Respecting the contract claim, the Court of Appeals simply found after "set[ting] forth the facts in a light most favorable to plaintiffs," one could not draw "a reasonable inference, as opposed to a guess," that the evidence reflected an intention that the 1972 high bid assurance apply to the 1973 bidding procedure (A8). Accordingly, the Court of Appeals held that "whether plaintiffs' evidence is viewed singly or cumulatively, it was insufficient as a matter of law to create a jury issue as to whether the 1972 high bid assurance was intended to apply to the 1973 bidding" (A9).

5. The Court of Appeals did believe, however, contrary to petitioners' assertion that respondent had no valid purpose, that the "parties seemingly desired to find the market price," a goal that is hardly inconsistent with the antitrust laws.

Petitioners claim the Court of Appeals applied the wrong standard of review in determining the sufficiency of the evidence here. The standard of review is not at issue: the Court of Appeals applied the standard of review that has been dictated by this Court and has been applied in other circuits. What petitioners are actually attacking is the Court of Appeals' application of that standard to the evidence here, an attack which is without basis and which does not raise a question that merits the attention of this Court.

The standard that the Court of Appeals applied here in finding the evidence insufficient to raise a jury issue of whether the 1972 assurances applied to the 1973 bidding is the proper one. The court viewing the facts "in a light most favorable to plaintiffs," found there was no jury issue because there was no evidence which "would permit a reasonable inference, as opposed to a guess," that the 1972 assurances were intended to apply to the 1973 bidding procedure, a critical element in petitioners' contract claim. This is precisely the standard set forth by this Court:

> "When evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. (Citations omitted.)"
>
> *Brady v. Southern Ry. Co.*,
> 320 U. S. 476, 479-80 (1943).

Petitioners' contention that the jury should determine, presumably by "guessing," the intention of the parties[6] on the basis of evidence from which no reasonable inference can be drawn combined with counsel's argument has no basis in law or logic, and it is not supported by the cases petitioners cite.

This Court's statements in *Lavender v. Kurn*, 327 U. S. 645, 653 (1946), do not, as petitioners claim, support such a standard of review. This Court in *Lavender* said that it is the function of the fact-finder to find *the most reasonable inference*. *Lavender v. Kurn*, 327 U. S. at 653, It did not hold or imply that a jury finding based on an unreasonable inference should be sustained. To the contrary, this Court in *Lavender* held that the jury verdict should be sustained there because, unlike here, there was *a reasonable basis* for the jury's inferences. *Lavender v. Kurn*, 327 U. S. at 652.

Nor did this Court depart from the principles respecting credibility and weighing the evidence enunciated in the cases cited by petitioners. The Court of Appeals neither asserted nor applied a standard under which it should determine or weigh credibility. Rather, the deficiency the Court of Appeals found respecting the evi-

6. Though petitioners refer to the proposition that "where no duration is specified in a contract, the intention of the contracting parties as to duration must be determined by the jury from the surrounding circumstances and by application of a reasonable construction to the agreement as a whole," that proposition is not at issue here. The Court of Appeals did not take issue with that proposition. To the contrary, its findings are based on that proposition. The Court of Appeals found the evidence insufficient because of the absence of evidence to support petitioners' contention that the intention of the contracting parties was that the assurances endure through the 1973 bidding:

> "Such evidence [the evidence relied upon by petitioners] is neutral at best as to the parties' intent with respect to the duration of the oral assurance to award the contract to the original high bidder" (A7).

dence was that there was no evidence from which one could *reasonably* infer that the 1972 assurances applied to 1973.

Moreover, petitioners' proposed standard makes no sense because it completely eliminates the role of the court in determining the sufficiency of the evidence where there is a jury. Since the jury under petitioners' proposed standard is free to make findings where there is no evidence to support those findings, there would be no basis for a non-suit or directed verdict in any case.

What petitioners are actually attacking is the Court of Appeals' analysis of the sufficiency of the evidence. However, it has long been recognized that certiorari should not be granted to review questions of the sufficiency of the evidence. *E.g., Houston Oil Company of Texas, et al. v. Goodrich, et al.*, 245 U. S. 440 (1918); *Southern Power Co. v. North Carolina Public Service Co., et al.*, 263 U. S. 508 (1924); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938).[7]

Moreover, the analysis of the evidence by the Court of Appeals was proper here. The Court of Appeals set forth and carefully analyzed each piece of "evidence" relied upon by petitioners.[8] It properly found much of

7. Though this Court did grant certiorari to consider the sufficiency of the evidence in the one Supreme Court case cited by petitioners, *Lavender v. Kurn*, 327 U. S. 645 (1946), in *Lavender* this Court was affected by the fact that *Lavender* was a *Federal Employers' Liability Act* case. Cf. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479 (1943); *Wilkerson v. McCarthy*, 336 U. S. 53, 55 (1949); *Harris v. Pennsylvania R. Co.*, 361 U. S. 15 (1959).

Even where certiorari is granted on other issues, questions in the petition respecting the sufficiency of the evidence are often excluded. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 484, n. 8 (1977).

8. Though petitioners state that respecting the application of the 1972 assurances to the 1973 bidding, the District Court judge found "eight items of evidence" to be "more than sufficient[ly]

the so-called "evidence" petitioners relied upon to be not evidence, but argument (A8),[9] and the rest to be neutral, that is not tending to prove anything singly or cumu-

8. (Cont'd.)
credible," this is a mischaracterization of the District Court's opinion.

The District Court, unlike the Court of Appeals, did not point to any items of evidence or discuss whether there was sufficient evidence to support the jury finding that the 1972 assurances applied to the 1973 bidding.

The District Court merely stated plaintiffs' contention respecting the application of the 1972 assurances to the 1973 bidding:

> "Sitkin *contends* that when it agreed to submit a bid for the entire plant in 1972, on the strength of Mr. Kline's assurances, a binding contract was thereupon formed and remained applicable through and including the 1973 bidding for the dismantling and salvaging of the plant equipment." (*Emphasis added*) (A27)

Thus, the conclusory statement respecting the "more than sufficient credible evidence" quoted by petitioners is not a conclusion reached after a discussion of the evidence. Nor is is even a conclusion directed to the jury finding that the 1972 oral assurances applied to the 1973 bidding. Rather it is the District Court's unsupported general reaction to the jury answers to all the interrogatories.

In fact, the District Court did not set forth or analyze "eight pieces" of evidence respecting any issue. Rather, the District Court merely set forth a narrative of what happened [A24-A26], with contradictory comments respecting the evidence. For example, respecting what was said during the conversation between Sitkin and Kline in which the assurances were given, the District Court judge stated both that: "The exact conversation was in dispute and therefore it was for the jury's determination;" [A25], and that "Mr. Kline's [company witness respecting the assurances] testimony did not dispute the general substance of the conversation. However, the defendant does dispute the legal significance of that conversation;" [A26].

9. Petitioners mislead this Court by quoting the Court of Appeals as characterizing the evidence as "argumentative" and thus of little weight (Petition, p. 11).

Nowhere does the Court of Appeals use the word "argumentative." Rather, the Court of Appeals points out that much of what plaintiff relies upon as "evidence" is in fact "argument" and thus not evidence at all and of course is entitled to no weight:

> ". . . the 1973 'evidence' relied upon by plaintiffs, much of which is argument, is neutral at best." (A8)

latively. Among the facts upon which the Court of Appeals' analysis was based are:

(1) Petitioners had the burden of proving the 1972 assurances applied to the 1973 bidding;

(2) Petitioners failed to produce evidence tending to prove the 1972 assurances applied to 1973;

(3) Not even petitioners testified that they believed the 1972 assurances were intended to carry over to 1973;

(4) Petitioners' part of the bargain, their bid which was submitted in response to the 1972 assurances, on its face expired on October 20, 1972; and

(5) The statements in the 1973 written bid solicitation materials, particularly FMC's reserving the right to reject any and all bids, were "flatly inconsistent" with the 1972 oral assurances.

Thus, the Court of Appeals was correct in finding that the evidence was insufficient as a matter of law to raise an issue of fact as to whether the 1972 high bid assurance applied to the 1973 bidding.

CONCLUSION.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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